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Darby & Darby PC
805 Third Avenue
New York, NY 10022

EXAMINER

LAMARRE, GUY J

ART UNIT	PAPER NUMBER
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2133

DATE MAILED: 07/08/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/557,256

Applicant(s)

BOTTON-DASCAL ET AL.

Examiner

Guy J. Lamarre, P.E.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 April 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-39 is/are pending in the application.
- 4a) Of the above claim(s) 1-5, 7, 12-24, 28-35, 38 and 39 is/are withdrawn from consideration.

- ✓ 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 6, 8-11, 25-27, 36 and 37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4, 6, 8.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

0. In response to Restriction requirements under 35 U.S.C. 12, as per office action of 1 April 2003, Claims 1-5, 7, 12-24, 28-35, 38-39 are cancelled. Thus, Claims 6, 8-11, 25-27 and 36-37 are elected. The IDS of 22 Aug. 2001, 21 Aug. 2002 and 4 April 2003 have been entered.

0.1 Pursuant to 35 USC 131, **Claims 6, 8-11, 25-27 and 36-37** are presented for examination.

Claim Rejections - 35 USC § 112 SECOND PARAGRAPH

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

1.1 It is unclear to the Examiner where the testing routine is effected in **Claims 6, 8-11, 25-27 and 36-37**.

1.2 It is also unclear to the Examiner what “arrival characteristics” represents or where the testing routine is effected in **Claim 6**, “packet exchange characteristics” in **Claims 8-10**, “characteristics of the exchange of the test data ... characteristics of the exchange of the application data” in **Claims 25-26**, “exchange characteristics of the application and test packets” in **Claims 36-37**.

1.3 Claim 36 recites: “...whereby the exchange characteristics of the application and test packets are compared.” Such recitation is non-functional language, and as a result, is not given patentable weight. It has been held that functional “whereby” statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ, 44 CCPA 937 (1957).

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

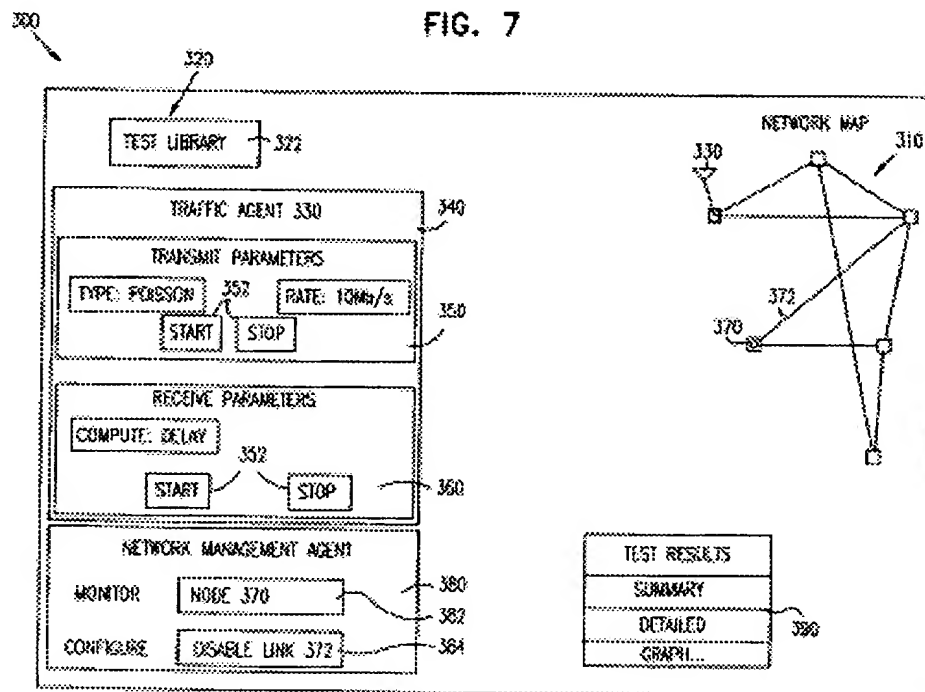
2.1 Claims 6, 8-11, 25-27 and 36-37 are rejected under 35 U.S.C. 102(e) as being anticipated by **Cidon et al.** (US Patent No. 6,269,330; DATE-FILED: October 1, 1998).

The applied reference has a common assignee and inventors (Cidon/Sidi) with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 102(e) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by an appropriate showing under 37 CFR 1.131.

As per Claim 6, Cidon et al. discloses, in Fig. 7, an equivalent method for testing of a communication network, using a plurality of traffic agents (col. 3 line 39) coupled to communicate via the network, the method comprising: transmitting (col. 3 lines 33-36 and 52) a sequence of data packets via the network from a first one of the traffic agents to a second one of the traffic agents, the sequence comprising both communication test packets and packets associated with an application that is accessed via the network (col. 3 lines 53-67); recording arrival characteristics of the packets in the sequence, responsive to receiving the packets at the

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second traffic agent (col. 4 line 10); and observing a difference in the arrival characteristics of the communication test packets relative to those of the packets associated with the application in col. 4 line 10.



As per Claim 8, said claim is rejected on the same rationale as that of Claim 6. Cidon et al. discloses, in Fig. 7, an equivalent method for testing of a computer application accessed via a communication network, using a plurality of traffic agents (col. 3 line 39) coupled to communicate via the network, the method comprising: running an instance of the application on a first computer coupled to the network, on which a first one of the traffic agents is also running (col. 3 lines 33-36 and 52); exchanging test data packets via the network between a second one of the traffic agents (col. 3 lines 33-36 and 52), running on a second computer coupled to the network, and the first traffic agent, so as to determine test packet exchange characteristics generally independent of the application; exchanging application data packets via the network

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between the second computer and the instance of the application running on the first computer, so as to determine application packet exchange characteristics; and comparing the exchange characteristics of the application and test packets in col. 4 line 10.

As per Claim 9, Cidon et al. discloses, in Fig. 7, an equivalent method according to claim 8, wherein running the instance of the application on the first computer comprises running an application server, and wherein exchanging the application data packets comprises transmitting application client messages from the second computer to the first computer in col. 3 lines 33-36 and 52.

As per Claim 10, Cidon et al. discloses, in Fig. 7, an equivalent method according to claim 8, wherein running the instance of the application comprises running a distributed computing application (col. 1 line 12) on the first computer, and wherein exchanging the application data packets comprises running another instance of the application on the second computer in col. 3 lines 33-36 and 52.

As per Claim 11, Cidon et al. discloses, in Fig. 7, an equivalent method according to claim 8, wherein comparing the exchange characteristics comprises comparing a delay in the exchange of application data between the first and second computers relative to the exchange of test data in Fig. 7 Block 360.

As per Claim 25, said claim is rejected on the same rationale as that of **Claim 6. Cidon et al.** discloses, in Fig. 7, an equivalent apparatus for testing of a computer application accessed via a communication network, comprising: a first computer (col. 1 line 21), coupled to communicate via the network, and configured both to run an instance of the application and to act as a first traffic agent; and a second computer (col. 1 line 21), coupled to communicate via the network with the first computer, and configured both to act as a second traffic agent so as to exchange test data packets via the network with the first traffic agent, generally independent of

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the application, and to exchange application data packets via the network with the instance of the application running on the first computer, so as to determine and compare characteristics (col. 7 line 15 et seq.) of the exchange of the test data with corresponding characteristics of the exchange of the application data.

As per Claim 26, Cidon et al. discloses, in Fig. 7, an equivalent apparatus according to claim 25, wherein the instance of the application running on the first computer comprises an application server (col. 6 line 65 et seq.), and wherein the second computer acts as a client of the application.

As per Claim 27, Cidon et al. discloses, in Fig. 7, an equivalent apparatus according to claim 25, wherein the characteristics that are compared comprise a delay in the exchange of application data between the first and second computers relative to the exchange of test data in Fig. 7 Block 360.

As per Claim 36, said claim is rejected on the same rationale as that of **Claim 6. Cidon et al.** discloses, in Fig. 7, an equivalent computer software product for testing of a computer application accessed via a communication network, the product comprising a computer-readable medium containing program instructions, which instructions, when executed by first and second computers coupled to communicate via the network, wherein the first computer is also running an instance of the application, cause the first and second computers to exchange test data packets via the network, generally independent of the application, so as to determine test packet exchange characteristics, and to exchange application data packets via the network between the second computer and the instance of the application running on the first computer, so as to determine application packet exchange characteristics, whereby the exchange characteristics of the application and test packets are compared.

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As per Claim 37, Cidon et al. discloses, in Fig. 7, an equivalent product according to claim 36, wherein the instance of the application on the first computer comprises an application server (col. 6 line 65 et seq.), and wherein the application data packets comprise application client messages (col. 11 line 33 et seq.) between the second computer and the first computer.

Conclusion

3. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

4.1 Any response to this action should be mailed to:

Commissioner of Patents and Trademarks, Washington, D.C. 20231

or faxed to:

(703) 746-7238, (for After-Final communications),

(703) 746-7239, (for formal communications intended for entry),

(703) 746-5463 (for informal or draft communications, please label

"PROPOSED" or "DRAFT").

Hand-delivered responses should be brought to Crystal Park II, 2121 Crystal Drive, Arlington, VA, Fourth Floor (Receptionist).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Guy J. Lamarre, P.E., whose telephone number is (703) 305-0755. The examiner can normally be reached on Monday to Friday from 9:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Albert De Cady, can be reached on (703) 305-9595.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 305-3900.

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Guy J. Lamarre, P.E

Guy J. Lamarre

Patent Examiner

6/28/03
